

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CHRISTINE PHILLIPS

PLAINTIFF

VS.

CAUSE NO. 3:19-cv-704-DPJ-FKB

BRIXMOR HOLDINGS 11 SPE, LLC.
c/o BRIXMOR PROPERTY GROUP, INC
AND JOHN DOES 2-5

DEFENDANTS

**BRIXMOR HOLDINGS 11 SPE, LLC'S REPLY IN
SUPPORT OF ITS MOTION TO DISMISS WITH PREJUDICE**

Plaintiff Christine Phillips does not dispute she failed to serve process within 90 days or request an extension as required by Fed. R. Civ. P. 4(m). She also has failed to demonstrate good cause for the nearly eight month delay. This requires dismissal. The circumstances of this case, however, support dismissing this action *with* prejudice.

First, there is a clear record of delay in this case. *See Dotson v. Tunica-Biloxi Gaming Comm'n*, 835 F. App'x 710, 714 (5th Cir. 2020) (finding eight-months was a "clear record of delay" and affirming dismissal with prejudice). Second, Plaintiff intentionally did not respond to the Court's December 30, 2020 Order to Show Cause. *See* Pl.'s Resp. Memo. [Dkt. #35] at 3 (conceding she *chose* not to respond to the Order to Show Cause). Plaintiff also has repeatedly ignored deadlines in the local rules, such as the deadline for responding to motions and for filing amended pleadings. Plaintiff actually acted *contrary to* the Court's first Order to Show Cause. *See* Dkt. #23. Instead of addressing the Court's stated concern about "five potential problems," *id.* at 2-3, Plaintiff unilaterally and untimely procured a summons from the Clerk of the Court. Plaintiff's

conduct later necessitated a second Order to Show Cause after she failed to respond to another motion filed in this matter. *See* Dkt. #31 at 3.

Plaintiff's actions in this case satisfy the test for "delay caused by intentional conduct." *Thrasher v. City of Amarillo*, 709 F.3d 509, 514 (5th Cir. 2013); *Price v. McGlathery*, 792 F.2d 472, 475 (5th Cir. 1986) (finding a "history of disobedience to [the] court's Orders" amounted to "contumacious conduct" supporting dismissal with prejudice). Plaintiff's counsel's efforts to claim personal responsibility for this conduct does not shield the case itself from dismissal. On the contrary, the Fifth Circuit has explained it is "mindful of the Supreme Court's teachings in *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), wherein the Court expressly recognized that an innocent litigant can be held responsible for the conduct of his attorney." *Veazey v. Young's Yacht Sale & Serv., Inc.*, 644 F.2d 475, 478 (5th Cir. 1981). Accordingly, this action should be dismissed *with* prejudice.

Even if the Court overlooks Plaintiff's contumacious conduct and clear record of delay, dismissal is at least appropriate without prejudice. Indeed, Plaintiff agrees that the Court should dismiss her claims against Brixmor Holdings 11 SPE, LLC, but she asks that dismissal be *without* prejudice rather than *with* prejudice. Pl.'s Resp. [Dkt. #34] at p. 2 ("[U]ndersigned counsel moves this court for a dismissal of this action without prejudice."); *see also* Pl.'s Resp. Memo. [Dkt. #35] at 7.

Dated: April 6, 2021

Respectfully submitted,

BRIXMOR HOLDINGS 11 SPE, LLC

By Its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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Dated: April 6, 2021

s/ Andrew S. Harris
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